



**Pate v The Commissioner of Lands, Through the Office of The Hon. Attorney General & 4 others  
(Environment & Land Case 565 of 2011) [2023] KEELC 17907 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17907 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 565 OF 2011**

**JA MOGENI, J  
MAY 25, 2023**

**BETWEEN**

**MINESH KANTIBHAI PATE ..... PLAINTIFF**

**AND**

**THE COMMISSIONER OF LANDS, THROUGH THE OFFICE OF THE HON.  
ATTORNEY GENERAL ..... 1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR MINISTRY OF LANDS, NAIROBI .... 2<sup>ND</sup>  
DEFENDANT**

**DIRECTOR OF SURVEY, MINISTRY OF LANDS, NAIROBI .. 3<sup>RD</sup> DEFENDANT**

**DIRECTOR OF SURVEY, MINISTRY OF LANDS, NAIROBI .. 4<sup>TH</sup> DEFENDANT**

**NAMANGA ROADS PROPERTIES ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted this suit by a Plaint dated 17/10/2011. The plaintiff prays for judgment against the defendants jointly and severally for:
  - a) A declaration that the certificate of Title issued to the Plaintiff in respect to the suit property is conclusive evidence of ownership. The Plaintiff is therefore the absolute and indefeasible owner of the suit property and the 5<sup>th</sup> Defendant or any other person/party has no right of possession
  - b) A declaration that the purported revocation plaintiff's parcel of land comprised in the title number LR No. 4275/58 IR No. 32660, situated along Riverside Close, Riverside, Nairobi, is null and void.



- c) An order restraining the 2<sup>nd</sup> and/or Defendants from registering any interests against the title number I.R No. 4275/58 to the detriment of the Plaintiff or otherwise interfering with its interests therein whatsoever and howsoever.
  - d) An injunction restraining 1<sup>st</sup> and 2<sup>nd</sup> Defendants from proceeding with any transfer or any other transaction on the title to all that parcel of land known as LR No. 4275/58
  - e) A declaration that LR No. 4275/124 that has purportedly and/or about to issue to the 5<sup>th</sup> Defendant is invalid, null and void and that the 1<sup>st</sup> defendant ordered to cancel the purported registration of the parcel of land known as I.R No. 4275/124 in the names of the 5<sup>th</sup> Defendant within a time frame to be provided by this Honorable Court
  - f) An order compelling the 1<sup>st</sup> Defendant to revoke the allotment of the parcel of land known as I.R No. 4275/124 to the 5<sup>th</sup> Defendant
  - g) An order to compel the 1<sup>st</sup> Defendant to delete any entry on the Plaintiff's Certificate of Title made as a consequence or in furtherance of all that parcel of land comprised in the title number I.R No. 4275/58 (also referred to as Land Reference No. 4275/124 in the Deed Plan No. 327839 dated 14<sup>th</sup> July 2011)
  - h) An order to restrain the 4<sup>th</sup> Defendant by themselves, servants and or/agents from deleting/ inserting or in any other way altering and/or tampering with the details as it appeared in the original deed plan.
  - i) A permanent injunction to restrain the 5<sup>th</sup> Defendant, whether by itself, its servants and/or agents from taking possession, erecting any structures, fencing off, constructing, encroaching or otherwise trespassing or in any other way interfering with Plaintiff's Land Parcel Number 4275/98 (original number 4275/8/3)
2. The plaintiff's suit as pleaded is that the plaintiff is and has at all material times been the registered owner and entitled to possession of the property known as LR No. 4275/58 (or original number LR 4275/58/3). The plaintiff states that he has since 1978 to date been paying the annual rent and all other necessary payments and is upto date. He has erected parallel stone walls as perimeter walls.
  3. The plaintiff avers that sometime in 2009 his advocates commenced the process of extension of lease of the said suit property and on or about 10/09/2009 his advocates, M/S A. Alibhai & Associate Advocates obtained approval from the City Council of Nairobi and a Notification of Approval of development Permission Form P.P A 2 Serial Number 000303 was issued.
  4. He avers that the Commissioner of Lands on 3/11/2009 acknowledged the letter from the Council seeking approval and the 1<sup>st</sup> defendant vide the same letter wrote to the Director of Physical Planning seeking comments about the extension of the plaintiff's lease and on or about 18/11/2009 the Director of Physical Planning responded by stating that there was no objection to the extension of lease.
  5. The Director of Survey too responded to the letter from the 1<sup>st</sup> defendant dated 3/11/2009 and stated that he had no objection to the proposal of the extension of the plaintiff's lease. With all these correspondences but not having a received a disapproval from the 1<sup>st</sup> defendant the plaintiff believed that his file at the Department of Land' Registry was working on the extension of lease.
  6. The plaintiff avers that by around 10/09/2010 or thereabout the file for the plaintiff was unavailable for perusal at the Land's Registry despite several trips made but it resurfaced between September 2011 minus the correspondences that the plaintiff has referred to herein.



7. The plaintiff avers that around September- October 2011 he was informed by his guards at the suit property that some strange persons in vehicles with number plates reading “GK” had been seen walking around the suit property without identifying themselves nor explaining to the guards the purpose of their visits. On or about 13-14<sup>th</sup> October 2011 the plaintiff realized that the suit property was in the process of being issued to a new grantee, the 5<sup>th</sup> Defendant herein without consideration of the due process by the 1<sup>st</sup> to 3<sup>rd</sup> defendants.
8. The plaintiff avers that he will suffer loss and damage and itemized them as follows:
  - a) The plaintiff has been deprived of the use and enjoyment of the suit property
  - b) Failing to observe due diligence when dealing with the plaintiff’s suit property herein.
  - c) Misrepresenting to the 5<sup>th</sup> Defendant that the suit property is available for disposal
  - d) Being negligent in discharging his duties as a Commissioner of Lands by giving orders to the 4<sup>th</sup> Defendant to alter the Plaintiff’s Deed Plan
  - e) Failing to observe the principles of natural justice.
  - f) The 5<sup>th</sup> Defendant is guilty of trespass and unless prevented by this Honorable Court, may prevent the Plaintiff from access the suit property.
9. The Plaintiff has sought for numerous declaratory orders in the Plaint, including a declaration that the removal of the Plaintiff’s name from the land register was null and void; a declaration that the allotment of the suit land to the 5<sup>th</sup> Defendant was illegal, null and void; and permanent injunction to restrain the 5<sup>th</sup> Defendant from the suit property among others as stated herein above.
10. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants filed a joint statement of defence dated 15/12/2015 in which they denied the plaintiff’s claim as stated in the plaint. They denied that the plaintiff has paid annual rent and all other payments of the property. Further they denied that the plaintiff has erected perimeter walls on the property.
11. They denied the contents of the plaint in particular they denied that the 1<sup>st</sup> defendant issued any undertaking for renewal of lease nor extension of lease. They stated that content of paragraph 16 in the plaint was not a form of guarantee to the plaintiff.
12. The defendants in particular deny that the plaintiffs file if any disappeared or was not available for perusal, order that any documents or correspondences one missing from the file.
13. They contend that the 1<sup>st</sup> defendant was undertaking his duties and that there was therefore no misrepresentation to the plaintiff or the 5<sup>th</sup> defendant. The further deny that the 1<sup>st</sup> defendant failed to observe the rules of natural justice.
14. They averred that there was ever any explicit guarantee from the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants that title would be processed in their name as the same is subject to the proper procedures of law which the plaintiff had had not complied with. That the plaintiff had failed establish the correct registration status of the property. It is their contention that the plaintiff’s suit is bad in law and incompetent and should be struck out.
15. The 5<sup>th</sup> Defendant filed a Notice dated 23/11/2021 to Co-Defendant as per Order 1 Rule 24 of the Civil Procedure Rules to the 1<sup>st</sup> Defendant, the National Land Commission who in their Notice is represented by the Commissioner of Lands claiming the following from them:



1. The sum of Ksh 1,027,400.00 paid to the 1<sup>st</sup> Defendant on account of allotment charges should the Court revoke the allotment of the Suit Property to the 5<sup>th</sup> Defendant as prayed in the Plaint
  2. Interest on (1) above from the date of payment of the said amount until payment in full
  3. Costs of the suit.
16. The plaintiff PW1- Minesh Kantibhai Patel did not call any other witness except himself and he testified on 08/06/2022. He adopted his witness statement dated 17/10/2021 as his evidence in chief and produced a bundle of documents numbered 1-28 as exhibits. Document number 28 he noted was the cancellation of the allotment to Namanga Roads Properties.
  17. It was his testimony that he was still in possession of the suit property and that his workers and their families still live on the suit property and that he had not been informed that the suit property was allocated to someone else.
  18. It was his testimony that he applied for extension of lease in 2009 vide a letter dated 18/05/2009 and the application was approved by the Ministry of Lands, County Government of Nairobi and confirmed by the Survey of Kenya. It was when he followed up for issuance of the letter of extension that he was informed that the subject file was missing. That upon further follow up with Commissioner Mabea, it was his testimony that he realized that there was an attempt to allocate the suit property to Namanga Roads Limited and he made a formal complaint to the Commissioner of Lands and he was issued with a cancellation of relocation dated 15/02/2012.
  19. Upon cross-examination by Mr Kamau Counsel for the 1<sup>st</sup> to the 4<sup>th</sup> defendants, PW1 stated that he had not received a document for extension for lease. Further that he had the original title of the property. He testified that he had an expired title. It was his testimony that at paragraph 24 he said that the defendants had failed to vacate the suit property but the defendants never took possession. At page 18 there is a certificate of title and there is a memorandum which shows special condition contained in Grant IR 589/1 but that he was not aware of the special conditions.
  20. It was his testimony that he purchased the property from Riverside Holdings in 1978 which is entry number 4 on page 19 of the Title document. He testified that there has been many developments on the land but there are approvals applied for at page 36 which contain extension of lease. He stated that the application for development and approvals for development is not contained in the bundle.
  21. He further stated in cross-examination that that in Prayer B of the plaint he was seeking a declaration that revocation of his allocation is null and void but that his title was not revoked. It was his testimony that for prayer No. G on the entry by 1<sup>st</sup> defendant, he had no evidence of any entry on the title that he holds.
  22. When PW1 was cross-examined by Mr Mbaluto for the 5<sup>th</sup> Defendant, he stated that it was correct that it is his father who bought the suit property for him in 1978 and he was aware of the conditions, one of which was that he had to develop the suit property. It was his testimony that they did small developments and abided by the conditions. He stated that his employees stayed on the property and he built a single story house full.
  23. He stated that he put up a semi-permanent structure where he houses two to three people although there was no provision for semi-permanent structure in the special conditions. Further that on the lease dated 1/01/1911 expired in December of 2010 and that by 1<sup>st</sup> January 2010 there was an application



made for extension which is dated 18/05/2009 and this can be found at page 26 of the plaintiff's bundle. He testified that the Ministry of Lands granted him the lease.

24. When further cross-examined he stated that he had shown only correspondence there is no application for Extension of Lease shown. Further that the suit property was sub-divided in 2005 upon his instruction into 3 titles LR 4275/90, LR 4275/91, and LR 4275/58/1. Further that although the suit property file went missing it was traced and found to be with the Commissioner of Lands. That there is no permanent structure on the suit property but there is a perimeter wall.
25. In re-examination he stated that he had made an application for extension of lease and he there are letters which are produced at page 30 and 32 to show that he had made the application. That with regard to sub-division, there were no certificates issued by the Ministry of Lands to show that the original title was surrendered since this did not happen. He further testified that the documents in court do not show that the defendants are in possession. At this point the plaintiff closed his case.
26. The 1<sup>st</sup> defendant – DW1 adopted the contents of her witness statement dated 23/11/2021. She testified that she visited the suit property in late 2009 and 2010 in the company of her co-director Cynthia and the suit property was bear, unfenced and undeveloped without any structure on the land. She stated that she had attached the letter of allotment in her bundle of documents at pages 1-2 and states that they had information that the lease had expired and they complied with all the terms of the letter of allotment which included making payments.
27. In cross-examination by Mr. Were Counsel for the plaintiff, she stated that she was informed about the property by one Mr Osman and Mr Too. She testified that she had not produced any application letter for allotment and that the Ministry of Lands acknowledged their application letter. She testified that there is a deed plan dated 14/07/2011 and an allotment letter dated 29/03/2011.
28. She testified that she had filed a Notice to Co-Defendant in order to be refunded the sum of monies paid. Through the Notice dated 23/11/2021 there is a letter from Ministry of Lands dated 15/02/2012 which confirms that the 5<sup>th</sup> Defendant should be refunded the said monies. It was her testimony that from the plaintiff's documents she had seen the application by the plaintiff for extension of lease after the expiry of lease. That the document at page 26 of the plaintiff's bundle refer to extension of lease which is LR 4275/58 and that according to the letter she has seen an application for extension of lease was made before the expiry period of the lease.
29. It was her testimony that when she went to the land she found a bare land but that she had no evidence before the court to prove this and that she was never issue with a title to the property. It was her testimony that the government had a right to offer any land to any body when it comes to expired leases. She testified that the cancellation of her allotment was never communicated to her though her advocate is said to have had the letter but she never saw it.
30. In further cross-examination by advocate for the 1<sup>st</sup> to 4<sup>th</sup> Defendants, she denied having received the cancellation letter which was issued in 2012 during the pendency of the suit further that the current suit was filed in November 2011. Further that the Notice dated 23/11/2021 was being issued to the National Land Commission (NLC) and the plaint only included the Commissioner of Lands as a party and not the NLC as a party.
31. She testified that the land allocated to the 5<sup>th</sup> Defendant was a defined property LR 4275/58 yet they were required to survey the land and the deed plan was then changed to reflect the new title as LR 4275/124. That there is no evidence that the surveyor Mr. B.M. Okumu a licensed surveyor was instructed by the government to carry out the said survey.



32. It was her testimony that when the 5<sup>th</sup> defendant went to take possession of the suit property the plaintiff put up an iron sheet fence and structure. That there is no grant or title issued in favour of the 5<sup>th</sup> defendant but at the same time she testified that she had not come across any grant and title in favour of the plaintiff neither had she come across any letter extending the lease of the suit property and since courts do not extend leases under the current law, then in the circumstances the suit property belongs to the government of Kenya and only the National Land Commission has the power to extend the lease.
33. In re-examination, she testified that the Notice to Co-defendant is directed to the National Land Commission since it is the one the succeeded the Commissioner of Lands. The Notice alludes that the 5<sup>th</sup> defendant followed due process and paid a total of Kesh 1,027,400 for purposes of allotment charges so that incase the plaintiff's case is upheld that the 5<sup>th</sup> defendant will be refunded the charges paid
34. It was here testimony that by 31/05/2010 the plaintiff sought to have the extension of lease and so that means that by that date there was no extension of lease. With this the 5<sup>th</sup> Defendant closed their case.
35. DW2- Mr. Wilfred Muchai the Principal Land Surveyor adopted his witness statement dated 16/05/2022 as evidence in chief and he produced 19 document as his exhibits marked DW2-Exh 1-19. When cross-examined he elaborated on the procedure for allotment of land which included an application letter and a notification to the applicant. He however stated that he does not know the procedure of allocation when the land is available but that where the lease has expired the words for a new grant are Re-grant and this is issued with a new number and no gazettelement takes place with regard to parcels of land issued with new numbers.
36. It was his testimony that surveys may be cancelled but not grants and that by the time B.M. Okumu was presenting documents there was correspondence from the plaintiff, there were document in favour of the plaintiff in form of surrender of deed plans for cancellation on 31/05/2010. That after the cancellation there was a request for extension of lease. The cancellation was recommended and requested by Commissioner of Lands.
37. He testified that in the bundle of documents at page 49 show that the initial owner prompted the cancellation and the letter and it was copied to Ali Bhai and Associates who represented the plaintiff then. That the Director of Survey through a letter dated 8/09/2010 stated that they had no objection to the plaintiff's proposal despite the presentation by B.M Okumu showing other activities. Further that she never conducted any due diligence to establish what was going on.
38. When she was cross-examined by Mr Mbaluto, she stated that at paragraph 18 of her witness statement, she confirmed that as at June 2010, no extension of lease had been granted. Further that with regard to the monies paid she stated that it is a right for the party who paid to be reimbursed although she was not clear on which law provided for this.
39. It was her testimony that a sub-division on any land can only be done by the land owner. Further the letter of allotment precedes the deed plan. In re-examination by Mr. Kamau, she stated that aa sub-division could only have been done by the previous owner. She testified that the extension of deed plan for this property has not been issued further that they never received any letter from the Commissioner of Land for preparation of a deed plan in favour of the 5<sup>th</sup> Defendant.
40. She stated that the deed plan in respect of the new grant was approved as per the document at page 17 of the 5<sup>th</sup> Defendant's Bundle, and that the deed plan was issued to B.M Okumu. Further that in respect of an expired grant, one cannot proess a sub-division.



41. DW3-James Mutugi Nyagah – the Principal Physical Planner testified that the Part Development Plan (PDP) of the 5<sup>th</sup> Defendant was not part of his records. He testified that the PDP in relation to the plaintiff's title is a letter that requested for comments for extension for lease to which a positive feedback was given and the Director of Land Administration gave the approval. Further that after preparation of the PDP there has to be a gazettment but that they had no records with regards to the 5<sup>th</sup> Defendant's PDP.
42. In cross-examination by Mr Mbaluto, he confirmed that there is no title issued to the 5<sup>th</sup> Defendant and that if the land is available, then the Director of Physical Planning will direct for preparation of a PDP. He testified that when a lease has expired it becomes public land and a fresh PDP does not need to be prepared. From the land at hand, the land is not being alienated.
43. During re-examination he stated that the land was being allocated to the 5<sup>th</sup> defendant as surveyed land and there was no need for a PDP. At this point the 1<sup>st</sup> to 4<sup>th</sup> Defendants closed their case.
44. The court gave directions hon filing of submissions

### **Analysis and Determination**

45. The plaintiff filed his written submissions dated 16/03/2023. while the 1<sup>st</sup> to 4<sup>th</sup> defendant filed theirs and the 5<sup>th</sup> defendants.
46. The parties' advocates took time to file written submissions. I have read them and will make reference to the relevant paragraphs. From the pleadings filed, evidence adduced and submissions rendered, I will also frame the issues I consider in my opinion to be those needing to be determined. I will however digress abit to share in summary the processes that are critical in allotment of public land prior to the promulgation of the current constitution. This may be of value to a Kenyan who may want to understand this complex yet important process given the important of land in Kenya.
47. Now, prior to the promulgation of the 2010 Constitution, before a grant is issued it was the practice that advertisements in the local dailies or the Kenya Gazette are made by the Commissioner of Lands (on behalf of the relevant County Council pursuant to Section 53 of the *Trust Land* (now repealed) on which the land is located. The advertisements invite members of the public to apply for the public plots. The advertisements specify the size of the plots, the prices thereof and other conditions relating to the intended allotments. Thereafter balloting is done and successful applicants are issued with letters of allotment.
48. This was not the only way of acquiring such lands, there were also direct Grants. Needy Kenyans applied to the Commissioner of Lands indicating the purpose of the land sought to be allocated accompanied by a plan showing the location of the plot. The Commissioner of Lands checks the records to determine whether the land applied for is available or whether it has any prior commitment. Once satisfied that it is available and meets all the other requirements, the Director of Physical Planning institutes the process of preparing a Part Development Plan. The plan must show that the land is vacant. Upon preparation of the PDP the same must be circulated to all the relevant offices for appropriate comments. On receipt of positive comments from all the concerned offices, the District Physical Planner submits the final print of the PDP together with copies of the comments to the Director of Physical Planning who will recommend the plan for approval by the Commissioner of Lands. Upon receipt of the plan, the Commissioner of Lands will further re-confirm that no other commitments have surfaced on the earmarked plot.
49. Once satisfied that it is vacant and available he instructs the Chief Valuation Officer to determine the value of the plot for alienation indicating the user of the plot, the term of the lease and conditions to be



attached thereto. The Chief Valuer determines the premium and the annual rent payable. Thereafter the Commissioner of Lands directs issuance of an allotment letter. The allottee is given time to accept the allotment and make the necessary payments. Once that is done the allottee is instructed to engage a surveyor. After the land is surveyed and beacon certificate issued, the Director of Surveys issues the land reference number and forwards the survey details to the Commissioner of Lands for issuance of a Grant or lease.

50. The plaintiff commenced the process of extension of lease in respect of this suit property in 2009 before the new constitution was promulgated vide a letter through his advocates to the Commissioner of Lands. DW3 testified that the PDP in relation to the plaintiff's title is a letter that requested for comments for extension for lease to which a positive feedback was given and the Directors of Survey and Physical Planning both gave their approvals on diverse dates in 2009 and 2010. Both DW2 and DW3 captured the process of grant of a lease as elaborated above only in this situation it was the process of renewal of lease.
51. As a matter of fact DW2 stated in his witness statement that if the Allocation approval process in respect of LR No. 4275/58 was to be invalidated, the Director would recall the records and issue adequate notice to all those that would be affected by the act of cancellation and recall of survey records. This was done vide the letter dated 15/02/2012 that recalled the allotment letter to the 5<sup>th</sup> Defendant.
52. DW3 stated that he did not come across any document showing that the Commissioner of Lands had authorized the allocation of the suit property to the 5<sup>th</sup> Defendant nor did he see any letter directing the Director of Physical Planning to institute the preparation of the appropriate plans in respect of the 5<sup>th</sup> Defendant. DW2 also stated that sub-division could only be done by the owner of the suit property and the plaintiff had testified that though the land was subdivided in 2005 into 3 titles, since the certificates of title were never issues with regard to the subdivision, the original title was never surrendered.
53. The advocates for the parties did not frame issues for determination although the plaintiff's advocate listed some four issues. However, from the pleadings and the evidence on record, the issues for determination may be summarized as hereunder:
  - i. Who, between the Plaintiff and the 5<sup>th</sup> Defendant, is the lawful owner of the suit property
  - ii. Is the Plaintiff entitled to the orders sought in the Plaintiff?
  - iii. Is the 5<sup>th</sup> Defendant entitled to the orders sought in the Notice to Co-Defendant?
  - iv. Who should bear costs of the suit
54. On the first issue, it is evident that legality of ownership of any property can always be deduced from the documents produced in court. In our case herein the registration document herein is the Certificate of title which emanates from the allotment. Exhibit PWExhibit 28 at page 62 of the plaintiff's bundle is a letter from the Ministry of Land cancelling the allotment letter to the 5<sup>th</sup> Defendant Namanga Road Properties.
55. Both the Plaintiff and the Defendant lay claim to the suit property. While the 5<sup>th</sup> Defendant had initially claimed that the property was allotted to them since the lease for the plaintiff expired and the government had a right to allocate to whoever they chose to allocate, the land to they admitted that they did not have a lease nor grant in their name. The plaintiff's lease has expired and a new one has not been processed.
56. To show the root of her title, the Plaintiff produced in evidence a letter dated 18/11/2009 seeking an extension of lease he also produced the Certificate of Title showing entry number 4 as a transfer to



- the plaintiff on 25/10/1978. The Plaintiff also produced in evidence a letter from the Commissioner of Lands to the Director of Survey dated 4/11/2009 requesting for comments from the Director in respect of the development application regarding extension of lease of the suit property pursuant to an approval issued by Director of City Planning dated 10/09/2009.
57. The Director of Survey alerted the Commissioner of Land about the sub-division relating to the suit property but vide a letter dated 27/05/2010 Commissioner of Lands notified the Director of Survey that the owner of the suit property had cancelled the sub-division and upon surrender of the sub-division deed plans to the Director by the owner of the suit property vide a letter dated 31/05/2010 from the advocates of the plaintiff, the Director of Survey issued favorable comments vide the letter dated 8/09/2010 in respect of the processing of the extension of the lease of the suit property in favour of the plaintiff who was the registered owner of the suit property.
58. On the other hand, the 5<sup>th</sup> Defendant tried to show the root of her title by producing in evidence an allotment letter dated 29/03/2011. She further produced in evidence a receipt for payment dated 10/05/2011. A letter dated 30/05/2011, by the Commissioner of Lands to the Director of Surveys through which the Director was informed that the 5<sup>th</sup> Defendant Namanga Road Properties of P.O. Box 22568-00100 Nairobi the allottee had paid for the plot LR. No. 4275/58 and accepted the offer and that the Director was not required to issue the Commissioner with a new deep plan for purposes of preparing a new grant. At the same time the 5<sup>th</sup> Defendant produced a new deed plan dated 14/07/2011 Number 327839 which produced a new grant for Land Reference Number 4275/124.
59. Having produced their supporting documents to show the root of their titles, this Court must then determine who has been able to satisfactorily show the root of their title. It is however not very difficult for the court to make a finding for the plaintiff. The DW2 and DW3 both testified to the authenticity of the documents held by the 5<sup>th</sup> Defendant. According to DW3, the Director of Survey approved and authenticated the New Grant on 06/07/2011 because the authority and supporting documents presented to the Director in support of this survey were authentic and that due process, consideration, consent and consultations were undertaken which led to the preparation of the Allotment Letter to the 5<sup>th</sup> Defendant and a deed plan number 327839 issued in respect of LR No. 4275/124. However, vide the letter from the Commissioner of Lands dated 4/10/2011 the Commissioner notified the Director of Survey of the cancellation of new grant since the implied survey to warrant a regrant never happened and so deed plan number 327839 could not be issued.
60. On his part, DW2 testified about the elaborate process used for land alienation where the request is made to the Commissioner of Lands and he confirmed that the letter Ref PPD/42/10(XV) 76 dated 18/11/2009 in the plaintiff's bundle of documents is authentic. He concluded by stating that with regard to the PDP for allotment of LR No. 4275/58 allotment to Namanga Properties there are no records of its preparation. This corroborates with the information in the letter from the Commissioner of Lands to the Director of Surveys dated 4/10/2011 notifying the about the cancellation of the new grant since the implied warrant of a regrant never happened and so the Deed Plan number 327839 could not be issued.
61. This was followed with the letter from the Commissioner of Lands cancelling allocation of LR 4275/58 to Namanga Properties vide the letter dated 15/02/2012. In the same letter the 5<sup>th</sup> Defendant is advised to seek a refund for the money paid for the suit property.
62. So it is clear to the Court that between the two the plaintiff and the 5<sup>th</sup> Defendant it is the plaintiff who is the proprietor of the suit property.



63. The Plaintiff herein has attached a Certificate of Title which shows that the suit land was transferred to Minesh Kantibhai Patel (the plaintiff) on 25<sup>th</sup> October 1978. Initially the suit land was owned by Riverside Holdings Limited.
64. In the case of *Republic vs City Council of Nairobi & 3 Others* (2014) eKLR, Odunga, J. had this to say about land that has already been allotted:
- “once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment, since a letter of allotment confers absolute right of ownership unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”
65. From the above analysis, it’s not in doubt that there is indeed a confirmation by the authority that between the 5<sup>th</sup> Defendant and the Plaintiff, it is the Plaintiff who was allocated the land since the Commissioner of Lands and the Director of Surveys and the Director of Physical Planning both confirmed that the Lease could be extended upon expiry. Further, it is not in doubt that the Plaintiff was the first one to seek the extension before the 5<sup>th</sup> Defendant sought to be allocated the land where the plaintiff had already been issued with a Certificate of title. Even though there was no competing titles, the Plaintiff’s title or allotment was the first in time. See the case of *Gitwany Investment Ltd v Tajmal Ltd & 3 Others*, Nairobi HCC No.1114 of 2002, where the Court relied in the words of the Court of Appeal in *Wreck Motors Enterprises v Commissioner of Land* C.A No.71/1997 where it was held that:-
- “.....like equity keeps teaching us, first in time prevails so that in the event such as this one, unlike by mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity”.
66. No evidence has been produced to show that the allotment letter issued to the 5<sup>th</sup> Defendant was never lawfully and validly cancelled and that the same was re-allocated to the plaintiff. In the absence of such evidence, the Court finds and holds that once the Plaintiff sought for extension of lease then he was allotted the said land, it could not be reallocated to another person. Therefore, the Plaintiff’s allotment letter came first in time and so did his certificate of title and hence he is the lawful owner of the suit property. See the case of *Ali Gadaffi & another v Francis Mubia Mutungu & 2 others* [2017] eKLR where the court stated:-
- “In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled....”
67. On the second issue whether the Plaintiff is entitled to the orders sought in the Plaintiff, the Plaintiff has sought various orders, amongst them a declaration that he is the absolute and indefeasible owner of the suit property. The Court has already held that he is the bonafide owner and therefore he is entitled to the said orders.
68. Further the Plaintiff has also sought for a Declaration that LR No .4275/124 that has purportedly and/or about to issue to the 5<sup>th</sup> Defendant is invalid, null and void and that the 1<sup>st</sup> Defendant be ordered to cancel the purported registration of the parcel...The Commissioner of Lands has already pronounced



- themselves on this matter vide their letter dated 15/02/2012 to Namanga Properties Limited, the 5<sup>th</sup> Defendant and even offered to refund the money paid by the 5<sup>th</sup> Defendant. The court will therefore not make this pronouncement since it is overtaken by events.
69. The Plaintiff has also sought for an order of injunction and restraining order against the 4<sup>th</sup> Defendant from tampering with the details as it appears in the Original Deed Plan. This Court having held that the Plaintiff is the owner of the suit property, it then follows that he is the absolute and indefeasible owner as provided by Section 26 (1) of the [Land Registration Act](#). Then he must be able to enjoy all the rights and privileges that appurtenant to it and the same can only be achieved if the 1<sup>st</sup> Defendant is compelled to delete any entry on the plaintiff's certificate of title as a consequence or in furtherance of all that parcel of land known as LR 4275/58.
70. Section 80 of the [Land Registration Act](#) gives the Court powers to issue an order of rectification of the register. The Court having held that the allotment made to the 5<sup>th</sup> Defendant is not valid, the same must therefore be cancelled and permanent injunction orders issued against her. Therefore, this Court finds and holds that the Plaintiff is entitled to the said orders.
71. On whether the 5<sup>th</sup> Defendant is entitled to the orders sought in the Notice to Co- Defendant dated 23/11/2021, I note that the Commissioner of Land has stated so in the letter dated 15/02/2012 in terms of the money paid and interest on the said monies until payment in full.
72. I associate myself with the decision of the court in [Macharia Mwangi Maina & 87 others v. Davidson Mwangi Kagiri](#) [2014] eKLR in which the court held that the respondent had established his rights over the portion of land that he was claiming under the equitable doctrines and stated:-
- “It is without doubt that the defendant having received the purchase price in full is estopped from relying on the defence that their agreement is void for non-compliance with Section 6 of the Land Control Act.”
73. In [Willy Kimutai Kitilit v. Michael Kibet](#) – Eldoret Civil Appeal No. 51 of 2015 the court made the following observation:
- “Thus, since the current Constitution has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to promote and protect that principle amongst other.....”
74. In the case of [John Kimani Njenga v Margaret Wanjiru Kanyiri & 2 others](#) [2015] eKLR, the court held that: -
- “It was argued by counsel for the 1st defendant that this claim cannot stand. Frankly, I do not understand the basis of that argument, for the 2nd defendant is co-defendant of the 1st defendant and Order 1 rule 24, does allow for a claim against a co-defendant. In fact, there is no other way that the 2nd defendant can seek remedy from the 1st defendant, other than filing a claim against co-defendant, which is precisely what was done in this case. The claim that the 2nd defendant has against the 1st defendant is squarely related to the claim of the plaintiff (emphasis mine). If the plaintiff succeeds, then the 2nd defendant loses the property, and the 2nd defendant is therefore perfectly entitled to seek indemnity from the 1st defendant. I have no doubt in my mind that the claim by the 2nd defendant against the 1st defendant is properly pleaded and properly on record.”



75. Therefore, Notice of claim against 1<sup>st</sup> Co-defendant dated 23/11/2021 and filed by the 5<sup>th</sup> Defendant is properly filed and I will indeed uphold the prayers since they are not contested by the plaintiff.
76. Finally, on the issue of Who should bear costs of the suit, Section 27 of the *Civil Procedure Act* gives the Court the discretion to grant costs. It is trite that costs usually follow the event unless special circumstances are presented before Court to warrant it to exercise its discretion and order otherwise. In this instant, the Plaintiff is the successful party but I note that he never made a prayer for costs.
77. Therefore, the Court finds and holds that the Plaintiff has proved his case on the required standards of balance of probabilities and is entitled to the orders sought in his Plaintiff. Further, the 5<sup>th</sup> Defendant's Notice to Co-Defendant is properly filed on record.
78. Consequently, having considered the pleadings, exhibits, the evidence adduced and the relevant provisions of law, the Court enters judgement for the Plaintiff against the Defendants herein jointly and severally as prayed in the Plaintiff's Plaintiff dated 17<sup>th</sup> October 2011. I therefore grant the following:
- a) A declaration is hereby issued that the certificate of Title issued to the Plaintiff in respect to the suit property is conclusive evidence of ownership. The Plaintiff is therefore the absolute and indefeasible owner of the suit property and the 5<sup>th</sup> Defendant or any other person/party has no right of possession
  - b) A declaration is hereby issued that the purported revocation plaintiff's parcel of land comprised in the title number LR No. 4275/58 IR No. 32660, situated along Riverside Close, Riverside, Nairobi, is null and void
  - c) An order restraining is hereby issued to the 2<sup>nd</sup> and/or Defendants from registering any interests against the title number I.R No. 4275/58 to the detriment of the Plaintiff or otherwise interfering with its interests therein whatsoever and howsoever.
  - d) An injunction is hereby issued restraining 1<sup>st</sup> and 2<sup>nd</sup> Defendants from proceeding with any transfer or any other transaction on the title to all that parcel of land known as LR No. 4275/58
  - e) A declaration is hereby issued that LR No. 4275/124 that has purportedly and/or about to issue to the 5<sup>th</sup> Defendant is invalid, null and void the 1<sup>st</sup> defendant is hereby ordered to cancel the purported registration of the parcel of land known as I.R No. 4275/124 in the names of the 5<sup>th</sup> Defendant within 30 days from the date hereof.
  - f) An order compelling the 1<sup>st</sup> Defendant to revoke the allotment of the parcel of land known as I.R No. 4275/124 to the 5<sup>th</sup> Defendant
  - g) An order to compel the 1<sup>st</sup> Defendant to delete any entry on the Plaintiff's Certificate of Title made as a consequence or in furtherance of all that parcel of land comprised in the title number I.R No. 4275/58 (also referred to as Land Reference No. 4275/124 in the Deed Plan No. 327839 dated 14<sup>th</sup> July 2011)
  - h) An order to restrain the 4<sup>th</sup> Defendant by themselves, servants and or/agents from deleting/ inserting or in any other way altering and/or tampering with the details as it appeared in the original deed plan.
  - i) A permanent injunction to restrain the 5<sup>th</sup> Defendant, whether by itself, its servants and/or agents from taking possession, erecting any structures, fencing off, constructing, encroaching or otherwise trespassing or in any other way interfering with Plaintiff's Land Parcel Number 4275/98 (original number 4275/8/3)



j) 5<sup>th</sup> Defendant prayers made in the Co-Defendant Notice dated 23/11/2021.

k) Each party shall bear their own costs of the suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MAY 2023.**

.....

**MOGENI J**

**JUDGE**

**Judgment read in virtual court in the presence of:**

**Ms Mutua holding brief for Mr Mbaluto for 5<sup>th</sup> Defendant**

**Mr Were for Plaintiff**

**No appearance for 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants**

**Ms. Caroline Sagina : Court Assistant**

.....

**MOGENI J**

**JUDGE**

